IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 205

In re CLYDE WILSON SUMMERS,

Petitioner.

REPLY BRIEF OF PETITIONER, REPLYING TO RETURN AND BRIEF OF THE JUSTICES OF THE SUPREME COURT OF ILLINOIS

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Replying to Respondents' Point I—This Court has jurisdiction to review the determination of the Supreme Court of Illinois.

A. This petition presents a case or controversy within the meaning of Article 3, Section 2 of the United States Constitution.

An examination of the record will disclose that a case or controversy does exist in the Supreme Court of Illinois because that Court entertained the petitioner's application for admission to the bar and took judicial action thereon with regard to a subject within its jurisdiction. If there were any question that a proper case or controversy had not been presented to it, the Supreme Court of Illinois

could have refused to entertain the petitioner's application. But the application was entertained and a decision was rendered upon the merits. (See letter from the Chief Justice to petitioner dated September 20, 1943 and the admission in page 4 of the return that the determination was rendered upon the merits.) Having chosen to treat the petitioner's application as a case for judicial determination and having actually decided the case upon the merits the Supreme Court of Illinois has thereby established that a case or controversy exists which can be reviewed by this Court under Section 2 of Article 3 of the United States Constitution. The mere fact that the case was considered "informally" in the chambers of the Justices and that the record of the proceeding was not made public is irrelevant. This Court must look to what was done and not to the labels which have been applied.

Furthermore, applications for admission to the bar have always been regarded as judicial proceedings in the Supreme Court of Illinois and this case conforms to the usual practice.

It is well settled that the Supreme Court of Illinois in passing upon applications for admission to the bar exercises a judicial function in a judicial proceeding. *In re Day*, 181 Ill. 73 (1899), involved an original petition in the Supreme Court of Illinois for admission to the bar of that state. The Court not only entertained the petition but held that its functions with regard to such applications are judicial. See also *In re Frank*, 293 Ill. 263 (1920), where the Court entertained judicially an application for admission to the bar, and *Bradwell* v. *Illinois*, 55 Ill. 535, affd. 16 Wall. 130 (1873).

On many occasions the Supreme Court of Illinois has decided that proceedings for the admission, disbarment

and punishment by contempt of attorneys are judicial proceedings. Therefore, *a fortiori*, such proceedings are "cases or controversies." In a recent case where it punished for contempt of Court and enjoined the unlawful practice of law by a banking corporation, *People* v. *Peoples Stockyards Bank*, 344 Ill. 462 (1931), the Court said (p. 471):

> "Since its inception this court has exercised original jurisdiction of proceedings relating to the admission and disbarment of attorneys, and although the constitutional provision [Article 6, Section 2 conferring original jurisdiction on the Supreme Court of Illinois in revenue, mandamus and habeas corpus cases] does not mention these subjects, the original jurisdiction of this court over such matters has never been questioned. This court has exercised original jurisdiction of applications for admission to the bar of this State (*In re Day, supra*) and in numerous cases has entertained original proceedings for disbarment."

See also *People ex rel. Chicago Bar Assn.* v. *Goodman*, 366 Ill. 346 (1937); *People ex rel. Chicago Bar Assn.* v. *Moseley*, 278 Ill. 377 (1917), and *People* v. *Novotny*, 386 Ill. 536, 540 (1944).

Under Illinois law, the legislative and executive branches of the government have no power over admission of attorneys to the bar, which is wholly a judicial function. *In re Day*, 181 Ill. 73 (supra).*

Not only under the practice prevailing in the Supreme Court of Illinois but also in common law courts generally, and so far as we can discover, in all statutory courts of the United States, admission to the bar has always been re-

* *Cf. In the Matter of Cooper*, 22 N. Y. 67 (1860).

garded as a judicial proceeding. (See *In re Secombe*, 19 How. 9 (1856); *In re Garland*, 4 Wall. 333 (1867); *Randall* v. *Brigham*, 7 Wall. 523, 535 (1869).)

Since the proceeding below constituted a judicial proceeding, it follows that this is a case or controversy within the meaning of Article 3, Section 2, of the United States Constitution. As this Court stated in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824) at page 819:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . . ."

See also *Marbury* v. *Madison*, 1 Cranch 137; Hughes, *Federal Practice*, § 240.

The respondents urge on page 21 of their brief that a "case" or "controversy" cannot exist here because this is not litigation involving opposing parties and susceptible of a judgment or decree. Respondents have apparently misunderstood the nature of this proceeding, which is an application by the petitioner *ex parte* for relief within the power of the Court, namely, its adjudication that he be admitted to the bar. In similar situations this Court has held that a case or controversy exists which confers jurisdiction upon the Federal Courts. *Neuberger* v. *U. S.*, 6 Fed. 2d 387 (D. C. S. D. N. Y., 1925) reversed *sub nom. Tutun* v. *U. S.*, 270 U. S. 568 (1926). In that case a petition for naturalization was held to present a case within the meaning of the Constitution and therefore reviewable on appeal, although

the proceeding involved a determination of status and was *ex parte*.

It is obvious that a "case" may arise although there is only one party and although his status is the subject matter of the proceeding.

B. The petitioner has not invoked the original jurisdiction of this Court.

The respondents argue on pages 22-23 of their brief that this proceeding cannot be entertained by original jurisdiction of this Court. Petitioner does not invoke such jurisdiction but has asked this Court to exercise its appellate jurisdiction (p. 3 of petition).

Replying to Respondents' Point I, subdivision 3, and Point II—This case presents a substantial Federal question, namely whether the act of the Supreme Court of Illinois denying petitioner's application for admission to the bar violates the Fourteenth Amendment to the United States Constitution.

The respondents have admitted that petitioner was denied admission to the bar of Illinois for the sole reason that he has asserted conscientious scruples against participation in war (p. 17 of respondents' brief). They have excluded petitioner from the practice of law (as shown by their return and by the record, which discloses no other ground) because he could not, they say, properly take the oath to support the Illinois constitution, which requires of its applicants for admission to the bar a willingness to bear arms in time of war. We are not concerned here with the correctness of the respondents' interpretation of Illinois law, since this Court is bound by the interpretation of its law which the highest Court of Illinois may adopt. We are

concerned only with the question whether Illinois law, as interpreted by its highest Court, and as applied to the petitioner, violates the Fourteenth Amendment.

The question, therefore, resolves itself to this: do the requirements of Illinois for admission to the bar as interpreted by its Supreme Court and as applied to the petitioner, deprive him of liberty and property and deny him the equal protection of the laws secured by the Fourteenth Amendment?*

Respondents assert that no substantial Federal question is presented for two reasons: (1) that this question has been adversely decided in *U. S. v. Schwimmer*, 279 U. S. 644 and *U. S. v. Macintosh*, 283 U. S. 605, and (2) that the petitioner could not support the Illinois constitution because he would be unwilling to serve in the militia which is provided for by the constitution.

The *Schwimmer* and *Macintosh* cases involved merely the question whether Congress had intended to exclude pacifists from naturalization, a very different question from that here presented. Since the Constitution contains no restrictions upon the powers of Congress to impose conditions for naturalization, the question here presented by the petitioner was not raised and it could not have been raised in the *Macintosh* and *Schwimmer* cases.**

* For a general discussion of this problem, see II *Bill of Rights Review* (Spring, 1942), pages 209-218. See also *In the Matter of Bluestone*, 311 U. S. 685, where this Court declined to review the exclusion from the Pennsylvania bar of an alleged Communist and the Supreme Court of that state argued that he was rejected not solely as a Communist but "on the basis of the entire record."

** Respondents have not mentioned another case which also has superficial resemblance to the case at bar, *Hamilton v. Board of Regents*, 293 U. S. 245 (1934), where it was held that a state could require military service in a state university without infringing the religious liberty of pacifist students. The decision turned on the fact that the state did not thereby deprive these students of their liberty, since they were free to pursue their studies elsewhere. Here, however, the petitioner is wholly excluded from the practice of law because the state has refused him a license, and this is an actual deprivation of his liberty.

Respondents' further argument that the oath required for admission to the bar implies a willingness to serve in the militia in time of war is also irrelevant, since we are not here concerned with the interpretation of the Illinois law, but with the question whether the law of Illinois as interpreted by its highest Court and as applied to the petitioner, deprives him of a constitutional right. In passing, we may point out, however, that the respondents have misconceived the requirements of their State for military service. Although the Illinois constitution does not contain any exemption from militia service in war time the legislature has not, at least since 1864, compelled war-time service in the militia. The unorganized or reserve militia of the state, both in the first World War and in the present conflict, has consisted only of volunteers. Illinois Laws of 1917, p. 782; Laws of 1943, Vol. 1, p. 1321 (Jones Ill. Statutes, Secs. 80.212 and 80.219 (2)).

CONCLUSION

This Court should set aside the determination of the Supreme Court of Illinois upon the ground that it deprives the petitioner of constitutional rights and should remand the case to the Supreme Court of Illinois for further proceedings in conformity with the decision of this Court.

The petitioner does not ask this Court to order the Illinois Supreme Court to admit him to the bar of that State, for such relief would be beyond this Court's power. The petitioner asks only that the determination of the Illinois Court be set aside as a deprivation of petitioner's constitutional rights and that this Court remand the case

to the Illinois Supreme Court for further proceedings on his petition for admission to the bar in conformity with such decision as this Court may render.

Respectfully submitted,

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